NO. 80-120

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondents.

RESPONSE OF THE STATE OF SOUTH DAKOTA TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY PETITIONERS ON JULY 25, 1980

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The Respondent believes that the Petitioner has fairly set forth in the Questions Presented for review a correct coverage of the questions addressed by the Supreme Court of the State of South Dakota, Opinion No. 12801, dated March 26, 1980.

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The references to the opinions of the South Dakota Supreme Court and those unreported below it are accurate. The Respondent believes that the correct statute that is involved in this lawsuit is 26 U.S.C. § 3309(b) and not 26 U.S.C. § 3309(a) as set forth by the Petitioner on page 7 of his Petition, as that is the section of the statute referred to by the South Dakota Supreme Court.

REASONS FOR DENYING THE PETITION

1. THERE WAS NO FEDERAL QUESTION OF SUBSTANCE DECIDED BY THE SOUTH DAKOTA SUPREME COURT NOT HERETOFORE DETERMINED BY THIS COURT.

The exact question of whether or not church schools should be subject to the payment of unemployment taxes on employees has not been resolved by this Court, as the issue has only recently arisen, but the determination of congressional intent as applied to acts of congress and to statutory construction of those acts, and the boundaries of the First Amendment of the United States Constitution have been set forth by this Court.

A. The South Dakota Supreme Court followed this Court's rulings in deferring to the contemporaneous construction of the federal statute given to the statute by the agency which was charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Unemployment Commission v. Aragon*, 329 U.S. 143 (1946); *American Fed. of State, City, and Municipal Employees v. City of Cleveland*, 484 F.2d 338 (6th Cir. 1973).

B. The South Dakota Supreme Court followed this

Court's rulings in looking to congressional intent in passing laws.

Congress has followed an unbroken path toward expansion of unemployment insurance coverage since 1935. Starting in 1970, Congressional revisions and accompanying legislative reports show that Congress expected the "operated primarily for religious purposes" language in section 3309(b) to be narrowly construed, at least as applied to educational institutions. This history is set forth in the opinion written by the South Dakota Supreme Court. Since Congress has not attempted nor did it actually alter the direction that the Department of Labor has taken since 1970, nor did it take any action since 1978 on the Department's interpretation of section 3309(b) this creates a presumption in favor of the administrative interpretation, to which the court will give great weight, even if the court doubts the original correctness of the ruling of the Department. *Costanzo v. Tillinghast*, 287 U.S. 341, 53 S.Ct. 152, 77 L.Ed. 350 (1932). Therefore, the Supreme Court of South Dakota did not break any constitutional ground in looking to congressional intent, but followed the previous rulings of this Court as to how to apply the intent.

C. The South Dakota Supreme Court followed this Court's rulings in applying the boundaries of the First Amendment Rights.

The Petitioner has raised the question as to whether or not the State has become excessively entangled in the operations of the church. This case involves the question of whether the South Dakota Unemployment Compensation Act infringes the freedom of religion enjoyed by the Petitioner under the First Amendment in its operation of religious

schools. This Court has previously determined that the Petitioner had to demonstrate that the legislation had a coercive effect and that such legislation operated against the Petitioner in the practice of its religion. *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

This Court has ruled that while the First Amendment protection of religious belief is absolute, religiously-based conduct "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1218 (1940). This Court has held that it is not excessive entanglement to require churches to observe child labor laws, *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), nor for them to follow the minimum wage requirements, *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d. 879 (7th Cir.), cert.den., 347 U.S. 1013 (1954), nor to prohibit polygamy, *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878). This Court has not tolerated those programs that require constant surveillance or supervision of the state to police its provisions or that single out churches or church-related schools for preferential treatment. To apply the provisions of the Unemployment Act is not to require constant surveillance or supervision of the church supported school. To allow preferential treatment as the Petitioner requests in this case, exemption from taxes that all other schools pay, would be to establish a religious preference in violation of the First Amendment and the rulings of this Court. *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977); *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); *Waltz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25

L.Ed.2d 697 (1970); *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

To apply the unemployment tax does not in any way entangle the state with the church. There is no public investigator in every classroom as was noted in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but a simple determination if the person claiming benefits was fired or quit.

The petitioner cites, *National Labor Relations Board v. Cathlic Bishop of Chicago*, 440 U.S. 490 (1979) for the authority that this Court has ruled on excessive entanglement between church and state. This Court declined to decide the First Amendment question in the absence of a clear expression of an affirmative intention of Congress to bring teachers and employees in church-related schools within NLRB jurisdiction. In this case Congress has shown its intention to have church schools pay unemployment taxes by its repeal of § 3309(b)(3). It can be seen that the South Dakota Supreme Court has followed all of the previous rulings of this Court and there was no federal question decided by them of substance which was not previously determined by this Court.

2. THE SOUTH DAKOTA SUPREME COURT DECIDED THE FEDERAL QUESTION THAT WAS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The Supreme Court of South Dakota followed this court's case law and the interpretation and application of the First Amendment rights under the United States Constitution and the Constitution of the State of South Dakota in reaching its decision. The Petitioners claim otherwise, but they seek from this Court an exemption from the laws that is not theirs to claim.

> The receiving of an exemption is thus a matter of legislative grace and not a constitutional right. As long as exemptions are denied by the Commissioner on a non-discriminatory basis using specific and reasonable guidelines and without inquiry into the merits of the particular religious doctrines, the withholding of religious exemptions is permissible under the Constitution. *Parker v. Commissioner of Internal Revenue*, 365 F.2d 792 (5th Cir. 1966), cert. den. 385 U.S. 1026 (1967).

In requiring the Petitioner to pay unemployment taxes on those they employ in their church-sponsored schools, the State of South Dakota is closely following the decisions of this Court which do not allow the establishment of religious preference. The reasoning of the South Dakota Supreme court and the cases it relied upon have been reproduced in the reported case of the South Dakota Supreme Court in Appendix A, A-1 through A-24, and need not be restated here.

CONCLUSION

THE QUESTION OF WIDESPREAD LITIGATION OF THIS ISSUE AS SET FORTH BY THE PETITIONERS IS CONCEDED.

The Respondents concede that this issue has provoked widespread litigation and that at this time only the State of South Dakota has taken the position of the Department of Labor. However, in this case the Supreme Court of South Dakota has faithfully followed the decisions of this Court in applying the law and the Constitution to the issues that were raised and therefore, respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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